SIANGLORY SDN BHD & ORS A

v.

MAYOR BANDARAYA KOTA KINABALU & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
DAVID WONG DAK WAH J
[CASE NO: KK-21-11-2011]
23 APRIL 2012

CIVIL PROCEDURE: *Declaration - Application for - Plaintiffs co-owned office block properties - Second defendant as management corporation of properties - Plaintiff planned to convert office block into hotel - Second defendant refused to approve plan - Plaintiffs proceeded submission of plans to Mayor - Whether second defendant had rights in law to refuse or object renovation plans* C D

The plaintiffs in this case were the registered co-subsidiary owners of properties at Wisma Pendidikan ('the properties') in Kota Kinabalu via Sale and Purchase Agreements dated 25 June 2007. In that same year, the plaintiffs started to engage a firm of architects for advice on converting the properties into a hotel and had submitted relevant plans to the management corporation ('second defendant') for approval but was subsequently rejected in September 2008. Despite this, the plaintiffs went ahead and submitted the renovation drawing plans to the first defendant, the Mayor of the City of Kota Kinabalu. The first defendant then replied that although the properties were located under Commercial Zone which permitted activity of lodging house/hotel, the plaintiffs' proposed renovation still required the approval of the second defendant. This was the plaintiffs' claim against the defendants to seek a declaration that the second defendant did not have the legal right to reject the plaintiffs' renovation plans. On the other hand, the second defendant had filed a counterclaim against the plaintiffs to remove 44 air-conditioner compressors from the side of the properties for outstanding service charges withheld by the plaintiffs on the ground that the second defendant's accounts had not been audited. The critical issue to be determined by the court was whether the plaintiffs in law were entitled to convert the use of their units into a hotel without the consent of the second defendant. E F G H I

Held (dismissing the plaintiffs' claim with costs; allowing the defendants' counterclaim with costs):

(1) The second defendant did have a legal duty to control, manage and administer the common properties and its legal duties include the right of refusal of endorsement to the plaintiffs' renovation plans. (*Cold Storage Singapore (1983) Pte Ltd v. Management Corporation Of Chancery Court & Ors*) (para 17)

(2) The sale and purchase agreement defines the word 'complex' which referred to the properties as 'the buildings constructed on the said land consisting of a block of offices and shops ...' Being a 'shop and office complex' it is inconsistent with a 'shop and hotel' complex as human traffic would be more in a hotel compared to an office, and in addition to that, more lifts would have to be built in order to meet that purpose. To use the properties as a hotel as planned by the plaintiffs would therefore be in contravention of the conditions agreed to by all the unit owners of the properties. (paras 26-27)

(3) With reference to the counter claim, according to s. 15(2)(ii) of the Land (Subsidiary Title) Enactment 1972, the management corporation *ie*, the second defendant does not possess any power of disposal over the common property. (para 35)

(4) The duty of the second defendant to have its account audited and the duty of the plaintiff to pay the service charges were statutory in nature and there was no provision in the Enactment stating that the payment of service charges was conditional on production of the audited accounts. It could not be the intention of the legislature that the right to demand payment of the service charges should be taken away when the accounts were not audited. The smooth running in the maintenance of a strata scheme is paramount or central to the maintaining the value of the complex as a whole. In the circumstances, the plaintiffs did not have the right to withhold payment of the service charges and avoid paying the surcharge under s. 19(7)(a) of the Enactment on the basis that the second defendant's accounts had not been audited. (paras 38 & 40)

(5) The plaintiffs' contention that the second defendant was prohibited from taking a civil action in court to recover the service charges was contrary to the intention of the Enactment. Section 19(5) of the Enactment clearly affixes liability on the plaintiffs to pay the service charges and they were recoverable by the second defendant. (paras 45-47 & 51)

Case(s) referred to:

Cold Storage Singapore (1983) Pte Ltd v. Management Corporation of Chancery Court & Ors [1989] 1 LNS 83 HC ***(refd)***

Management Corp Strata Title Plan No. 1378 v. Chen Ee Yuen [1994] 1 SLR 463 ***(refd)***

Perbadanan Pengurusan Taman Bukit Jambul v. Kerajaan Malaysia [2000] 5 CLJ 98 HC ***(refd)***

Shaw v. Groom [1970] 2 QB 504 ***(refd)***

Legislation referred to:

Building By-Laws 1951 [Sabah], s. 38D

Land (Subsidiary Title) Enactment 1972 [Sabah], ss. 6A, 8(3), 14(2), 14A(1)(a), 15(2)(ii), 18(2), 19(5), (6), (7)(a)

For the plaintiff - PK Lim; M/s PK Lim & Co

For the defendants - Richard Barnes (Alvin Leong & Alice Chew with him); M/s Shelley Yap

Reported by Baizura Abd Razak

JUDGMENT

David Wong Dak Wah J:

Proceedings

[1] The plaintiffs' claim against the defendants in essence is to seek a declaration from this court that the 2nd defendant did not have the legal right to reject the plaintiffs' plan to turn his units on 1st, 2nd and 3rd floor in the building known as Wisma Pendidikan into a hotel. The 2nd defendant denies the plaintiffs' contention on the ground that they are legally bound to abide by the majority decision of the unit owners in Wisma Pendidikan of rejecting the plaintiffs' plan and had also taken a counterclaim against the 1st, 2nd and 3rd defendant (in the counterclaim) to remove the 44 air-conditioner compressors from the side of Wisma Pendidikan at their expense and for outstanding service charges.

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Background

[2] The 1st, 2nd and 3rd plaintiffs are registered co-subsidiary owners of properties at Wisma Pendidikan in Kota Kinabalu through six separate Sale and Purchase Agreements all dated
B 25 June 2007 entered into between Malaysian Assurance Alliance Berhad (as vendor) of the one part and the plaintiffs (as joint purchasers). The consideration was the sum of RM2,315,400. The units are situated on the 1st, 2nd and 3rd floors (the plaintiffs' properties).

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[3] The plaintiffs were registered as co-subsidiary owners under the respective subsidiary titles pursuant to the Land (Subsidiary Title) Enactment, 1972 (Enactment); and allocated share units with particulars as follows:

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No.	Name of Owner	Floor	Subsidiary Title No.	Share Units
1	Plaintiffs	1A	010500866	25
2	Plaintiffs	1B	010500982	25
E 3	Plaintiffs	2A	010500875	20
4	Plaintiffs	2B	010500991	20
5	Plaintiffs	3A	010500884	20
6	Plaintiffs	3B	010501005	20
F			**Total:**	**130**

[4] The plaintiffs sometime in June 2007 or thereabout engaged a firm of architects to advice and help to convert the properties
G into a hotel. The 1st plaintiff on behalf of the 2nd, 3rd plaintiff and himself submitted the relevant plans of the firm of architects to the 2nd defendant by letter dated 4 July 2008 for approval.

[5] The 2nd defendant however through their Advocates, Messrs
H Shelley Yap, by letter to the 1st plaintiff dated 25 July 2008 refused to approve the plaintiffs' plans. Without the approval of the 2nd defendant, the plaintiffs acting through the firm of architects submitted to the 1st defendant the plaintiffs' renovation plan Drawing No. KK/07/250/1 dated September 2007.

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[6] The 1st defendant had on 28 August 2007 informed the 1st plaintiff, *inter alia*, that based on the Kota Kinabalu Local Plan, Wisma Pendidikan is located under Commercial Zone which permits activity of Lodging House/Hotel. However the 1st defendant on 23 October 2008 informed the plaintiffs' architect the followings:

> PROPOSED RENOVATION FOR LOADING HOUSE ON FIRST FLOOR, WISMA PENDIDIKAN ...
>
> ...
>
> 2. I am to inform you that the following conditions should be complied with for further consideration:
>
> ...
>
> 2.3 Consent from the management corporation of the building should be obtained and sign on the plan as some of the upper floor sharing the same staircase are still using as office.
>
> and:
>
> PROPOSED RENOVATION FOR LODGING HOUSE ON 2ND & 3RD FLOOR, WISMA PENDIDIKAN ...
>
> ...
>
> 2. I am to inform you that the following conditions should be complied with for further consideration:
>
> 2.1 The plan to be countersigned by the Management of the building.
>
> 2.2 A resolution report from the building Management for other tenants or owners using the same staircases and lifts should be obtained for the conversion of 2nd & 3rd floor to lodging house.

[7] The plaintiffs of course could not comply with the conditions of the 1st defendant in view of the stand of the 2nd defendant who through its solicitors, Messrs Shelley Yap, by a letter to the 1st plaintiff dated 2 September 2008 had informed in the clearest terms that the 2nd defendant will not approve the plaintiffs' plan to use their properties as a hotel.

[8] The consequence of this deadlock is this legal suit.

A **[9] Agreed Issues**

(i) Whether the 2nd defendant is entitled to object to or refuse to approve the plaintiffs' renovation plans on the basis that the majority of the owners of units in Wisma Pendidikan
B object to the use of the properties as a hotel?

(ii) Whether:

(a) any objection and refusal by the 2nd defendant to approve the plaintiffs' renovation/building plans of the properties (ie,
C Lots A and B, 1st floor; Lots A and B, 2nd floor and Lots A and B, 3rd floor of Wisma Pendidikan, Jalan Balai Polis, 88850 Kota Kinabalu, Sabah, Malaysia) into a Hotel prepared by Arkitek P Liaw namely:

D Plan KK/07/250/1A showing Location Plan, Ground Floor Plan, first floor plan, Second & Third Floor Plan & Section A-A.

is unlawful, null and void?

E (b) the installation of air-con compressors on the left (22 units) and right (22 units) external walls of the properties constitute an alteration of the external walls pursuant to s. 6A of the Third Schedule of the Land (Subsidiary Title) Enactment 1972 ("the Enactment")?

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(c) is it necessary in law for the plaintiffs to obtain a resolution report from the 2nd defendant for the 2nd defendant's approval to use the same staircases and lifts when applying to convert the properties into a Hotel?

G

(iii) Whether the plaintiffs have the right to withhold payment of the service charges and avoid paying the surcharge under s. 19(7)(a) of the Enactment on the basis that the 2nd defendant's accounts have not been audited?

H (iv) Whether, in order to recover service charges, the 2nd defendant is restricted only to registering charges on the properties pursuant to s. 19(6) of the Enactment and proceeding under the Land Ordinance (Sabah Cap. 68)?

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(v) Whether the plaintiffs are still liable for the sum of RM27,335.56 being the plaintiffs' alleged contribution towards the canopy and painting expenses totalling RM93,721.92 when the plaintiffs had made a donation for the painting works up to the sum of RM17,500?"

Issues (1) and 2(a)

(i) Whether the 2nd defendant is entitled to object to or refuse to approve the plaintiffs' renovation plans on the basis that the majority of the owners of Units in Wisma Pendidikan object to the use of the properties as a hotel?

(ii) Whether:

(a) any objection and refusal by the 2nd defendant to approve the plaintiffs' renovation/building plans of the properties (ie, Lots A and B, 1st floor; Lots A and B, 2nd floor and Lots A and B, 3rd floor of Wisma Pendidikan, Jalan Balai Polis, 88850 Kota Kinabalu, Sabah, Malaysia) into a Hotel prepared by Arkitek P. Liaw namely:

> Plan KK/07/250/1A showing Location Plan, Ground Floor Plan, first floor plan, Second & Third Floor Plan & Section A-A.

is unlawful, null and void?

[10] Both of these issues relate to the crucial question of whether the plaintiffs in law are entitled to convert the use of their properties into a hotel without obtaining the consent of the management corporation – the 2nd defendant.

[11] Before I deal with that question, I must deal with the submission of learned counsel for the 2nd defendant that the plaintiffs' remedy in fact should be against the 1st defendant as it was them who had imposed the condition that any application for renovation of the plaintiffs' properties must have the endorsement of the 2nd defendant. And since the plaintiffs have terminated their action against the 1st defendant, their action remains in doubt. Learned counsel refers the court to the case of *Perbadanan Pengurusan Taman Bukit Jambul v. Kerajaan Malaysia* [2000] 5 CLJ 98, where the plaintiff there, being the management corporation, sued the defendant for renovating units owned by them for the

purpose of making a government health and dental clinic without the management corporation's approval but had the approval of the local authority. The court held at p. 123-124 that:

> The approving authority is the MPPP. It is for MPPP to say whether it requires plans to be approved or not. The defendant cannot be blamed if the MPPP does not require the defendant to get the approval.
>
> ...
>
> MPPP is not a party in this suit. In my view if the plaintiff wants to challenge the decision of MPPP it should either apply for judicial review or name the MPPP in this suit.

[12] I am in no doubt that the 1st defendant should have remained as a party to the suit and that learned counsel's submission, that the conditions contained in the letter dated 23 October 2008 was a requirement of the 1st defendant and not of the 2nd defendant, has some merit and I could have very well dismissed the plaintiffs' claim on the ground that their remedy is against the 1st defendant.

[13] However I am not taking that route for the simple reason that it will only delay the adjudication of the real dispute at hand, which as stated earlier is whether the plaintiffs in law are entitled to convert the use of their units into a hotel without the consent of the 2nd defendant.

[14] With that I shall now deal with the real dispute at hand.

[15] The plaintiffs' submissions can be summarised as follows:

(a) The 2nd defendant has no *locus standi* to object to or refuse to approve the plaintiffs' renovation plan as it is a separate entity to the majority owners of the units in Wisma Pendidikan who had objected to the renovation plan.

(b) The plaintiffs' renovation plans do not fall within s. 6A of the Third Schedule to the Land (Subsidiary Title) Enactment, 1972 which reads as follows:

> 6A. The owner shall not make any alteration to the external walls and balconies of his parcel or to the windows and doors installed in the external walls of the building without having obtained the approval in writing of the management corporation, in addition to the approval from any authority.

(c) The 2nd defendant is not empowered under any provision of law to object or refuse to approve the plaintiffs' renovation plans of the Properties into a Hotel as Wisma Pendidikan is situated in a commercial zone where lodging house/Hotel activity is permissible.

(d) The renovation plans do not contravene any of the provisions and conditions of any By-Laws relating to the Properties/ Wisma Pendidikan made by the 2nd defendant (if any) pursuant to s. 18(2) of the Land (Subsidiary Title) Enactment, 1972.

(e) There is no provision in the Subsidiary Title of the Properties prohibiting the plaintiffs from using their units in the Hotel business.

Ground 1

[16] From my understanding of submission of learned counsel for the plaintiffs, he is saying that despite the objection of the majority of owners of Wisma Pendidikan to the renovation plans, the 2nd defendant cannot act on their behalf as the 2nd defendant is a separate entity.

[17] At the outset, I agree with the 2nd defendant's contention that they have a legal duty to control, manage and administer the common property of Wisma Pendidikan. This legal duty of course includes the right of refusal of endorsement to the plaintiffs' renovation plan. This much is clear in the case referred to by learned counsel for the 2nd defendant in *Cold Storage Singapore (1983) Pte Ltd v. Management Corporation of Chancery Court & Ors* [1989] 1 LNS 83; [1989] 3 MLJ 400 where the Singapore High Court at pp. 405-406 opined as follows:

> ... the argument that the first defendant's action was *ultra vires* the HUDC Act has no merit. The first defendant not only has the power to manage the estate, it is under a duty to do so. The regulation of the use of the roads and the car parks in the estate comes within the first defendant's power of management and would plainly be for the benefit of the residents therein. Moreover, the adoption of the scheme was effected at a general meeting of the lessees of the flats in Chancery Court who were the owners as tenants in common of the roads in the estate. Therefore, even if they did not have the statutory power, they had the power to

A implement the scheme, having been authorised by the owners to do so. The argument relating to the lack of authority on the part of the management committee in implementing the scheme in April 1989 is also without merit.

B **[18]** That power of course must be exercised judiciously and for valid grounds. Accordingly I find the plaintiffs' ground 1 to be without merit.

Ground 2

C **[19]** With respect, this ground is irrelevant to this issue as it concerns the use of common property. However it is relevant to issue 2(b) which I shall then discuss this ground.

Grounds 3, 4 And 5

D **[20]** These grounds relate to the crucial issue of the plaintiffs' right to use his properties as a hotel business. The starting point in my view must be Part III(a) of the Main Rights and Obligations and Restrictive Covenants for the Regulations (Interim) of Wisma Pendidikan, Kota Kinabalu which specifically states that each unit E owner covenants

> Not to use or permit to be used the unit (parcel) except for the purpose that stated in the sale/purchase agreement.

F **[21]** That sale and purchase agreement refers to the sale and purchase agreement between the developer, namely Tah Len Enterprise Sdn Bhd (the developer of Wisma Pendidikan) and Malaysian Assurance Alliance Bhd (the first purchaser of the properties) in respect of the properties dated 18 November 1989. That agreement states that the definition of the word "Complex" G which was to be named "WISMA PENDIDIKAN" was "the buildings constructed on the said land consisting of a block of offices and shops in accordance with the approved building plans comprising commercial premises to be used solely for commercial purposes and other facilities serving the same."

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[22] The Approved Building Plans for the Proposed Commercial & Office Complex at TL 017528237 KK, Drawing Nos C11(e)/2a and C11(e)/3a (Wisma Pendidikan) show that the building is approved for use as "SHOP" for the Ground Floor, "SHOP/ I OFFICE" for the 1st Floor and "OFFICE" for the 2nd to 11th Floors.

[23] Further s. 38D of the Building By-Laws 1951 specifically states that: A

> Where any building has been erected no person shall except with the written permission of the Council and upon such terms as may be imposed alter or use, or (being the owner thereof) suffer such building to be used otherwise than for purposes specified or indicated in the application and plans approved in respect thereof; nor to be occupied in such manner as to provide more dwelling than were specified or indicated in such application and plans. B

[24] Based on the above documents, learned counsel for the 2nd defendant submits that to use the plaintiffs' properties as a hotel, the plaintiffs would be deviating from the approved plans and the terms of the sale and purchase agreements. C

[25] I find merit in learned counsel's submission for the simple reason that the plaintiffs and the other owners of Wisma Pendidikan are what we call strata title owners under the Land (Subsidiary Title) Enactment 1972 and all are bound by terms and conditions agreed to by all the owners when they agreed to be part of a complex which is what we call a strata scheme which has been described by Gary F Bugden in *Strata Title Management Practice in New South Wales* – 6th edn as follows: D E

> A strata scheme is a legally recognised arrangement whereby a building and the land upon which it is erected is subdivided into lots or lots and common property, the lots (or units as they are commonly called) having separate title, the transfer of which is not inherently restricted, the common property being used by the occupiers of the lots but owned by a body corporate as agent of the owners of the lots in specified proportions. F

[26] If I may add here, individual owners of any strata scheme must understand that they do not have complete freedom to do as they wish to their units for the simple reason that their ownership is subject to the conditions which all the owners of units had agreed to and until such conditions are changed, they are duty bound by those conditions. In the case at hand, Wisma Pendidikan was built as a 'shop and office complex' which in my view is inconsistent to a 'shop and hotel complex'. I say that for the simple reason that the human traffic in an office complex will be markedly different and less than that of an office/hotel complex. I would have no doubt that more lifts would have been built had G H I

A Wisma Pendidikan was meant to be a hotel. With the number of lifts existing presently, it would no doubt inconvenient the present users of the Wisma Pendidikan by the increase of human traffic flow if the plaintiffs' units are used as a hotel. Needless to say the requirements by the Fire Department would have been markedly
B different had Wisma Pendidikan was meant to be used as a hotel when the same was built. Further the mix of human traffic will also be different if Wisma Pendidikan is used as a hotel and in my view would affect the security of the complex as a whole.

C **[27]** For reasons stated above, I find that the plaintiffs had no right to use their properties as a hotel as it would contravene the conditions agreed to by all the unit owners of Wisma Pendidikan. Accordingly the answers to this issues 1 and 2 are in the affirmative and negative respectively.

D **Issue 2(b)**

Whether The Installation Of Air-con Compressors On The Left (22 Units) And Right (22 Units) External Walls Of The Properties Constitute An Alteration Of The External Walls Pursuant To Section 6a
E *Of The Third Schedule Of The Land (Subsidiary Title) Enactment 1972 ("The Enactment")?*

[28] It is contention of the plaintiffs that the installation of the air-con compressors did not contravene s. 6A of the Third
F Schedule of the Enactment which states as follows:

> The owner shall not make any alteration to the external walls and balconies of his parcel or to the windows and doors installed in the external walls of the building without having obtained the approval in writing of the management corporation, in addition to
G the approval from any authority.

[29] This issue is concerned with whether the external wall constitutes common property which is defined by the Enactment as follows:

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> (a) the land on which the building stands, together with so much of the building as is excluded from the parcels; and
>
> (b) the remainder of the lot, together with any other buildings standing thereon

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[30] I have no doubt that after examining the plans in the subsidiary titles of the plaintiffs' properties, the external walls of Wisma Pendidikan is common property. It is quite clear that the exterior walls are clearly excluded from the plan. My view is fortified by s. 8(3) of the Enactment which states that:

> For the purposes of the preparation of any such plan, the common boundary of any parcel of a building with any other parcel, or with any part of the building which is not included in any of the parcels, shall, except in so far as it may have been otherwise provided in the relevant storey plan, be taken to be the centre of the floor, wall or ceiling, as the case may be.

[31] The ownership of common property is set out in s. 15 of the Enactment clearly which states as follows:

> (1) The management corporation on its establishment shall become the owner of the common property and the custodian of the issue document of title to the land.
>
> (2) The management corporation shall have in relation to the common property the powers conferred by the provisions of the Land Ordinance on an owner in relation to his land ...

[32] That simply means the 2nd defendant is in control of the external walls of the Wisma Pendidikan and as custodian they have the power to regulate what can be put on the common property. That power of course is subject to what the owners of Wisma Pendidikan decide. There can be no dispute that the plaintiffs had installed numerous air-con compressors on both sides of the external walls of Wisma Pendidikan via metal brackets and with that installation it has changed the external profile and appearance of both the properties and the building as a whole. The plaintiffs' submission is premised on the argument that s. 6A of the Third Schedule of the Enactment should be interpreted to mean 'structural' alteration. With respect that interpretation is without merit and I can do no better to refer the Singapore case cited by learned counsel for the 2nd defendant. In *Management Corp Strata Title Plan No. 1378 v. Chen Ee Yuen* [1994] 1 SLR 463 where the relevant by-law 13 (similar to s. 6A of the Third Schedule of the Enactment) the learned judge stated at p. 466:

A subsidiary proprietor or occupier of a lot shall not make any alterations or additions to any balcony of his lot without the written approval of the management corporation.

And a similar by-law 12 at page 467:

A subsidiary proprietor or occupier shall not make any alteration to the windows installed in the external walls of the sub-divided building without having obtained the approval in writing of the management corporation.

[33] In respect of the contention of structural alteration, the learned judge had this to say:

Considering both by-laws 12 and 13, it seems to me clear that one of the main objects of these two by-laws is to maintain the external appearance of the building.

...

Both the balcony and the windows ... are features of the building which are visible from the exterior. It is, therefore, obvious that the power of regulation given ... to the management corporation is to ensure some measure of uniformity in the appearance of each individual unit so as to enhance the overall appearance of the building. If anything is to be done which could affect the external appearance of the building, the management corporation must first decide.

[34] Before I make the final order, it should be noted common property cannot be disposed of by the management corporation either during the initial period or thereafter. This is so provided by s. 14A(1)(a) of the Enactment which states as follows:

14A(1) Notwithstanding any other provisions of the Enactment, the management corporation shall not, during the initial period:

(a) Amend, add to or repeal its by-laws in such manner that a right is conferred or an obligation is imposed on one or more but not all owners or in respect of one or more but not all owners

(b) ...

(c) ...

> (2) Without prejudice to any other remedy available against the original owner, if a management corporation contravenes subsection (1), the actual owner shall be liable for any loss suffered by the management corporation or any parcel owner as a result of the contravention and the management corporation or any parcel owner may recover from the original owner as damages for breach of statutory, any loss suffered by it or him in consequence of such contravention.

[35] It is also provided in s. 15(2)(ii) of the Enactment that the management corporation does not possess any power of disposal over the common property of the strata scheme.

[36] For reasons stated above, the answer to this issue must be in the affirmative.

Issue 2(c)

Whether It Is Necessary In Law For The Plaintiffs To Obtain A Resolution Report From The 2nd Defendant For The 2nd Defendant's Approval To Use The Same Staircases And Lifts When Applying To Convert The Properties Into A Hotel?

[37] For reasons stated in the previous issue, my answer can only be in the affirmative. If I may add, the 1st defendant's requirement for such consent from the 2nd defendant when considering the application of the plaintiffs to use their properties was in fact proper and appropriate.

Issue 3

Whether The Plaintiffs Have The Right To Withhold Payment Of The Service Charges And Avoid Paying The Surcharge Under s. 19(7)(a) Of The Enactment On The Basis That The 2nd Defendant's Accounts Have Not Been Audited?

[38] This issue is premised on the plaintiffs' contention that their liability to pay the services charges is dependent on the 2nd defendant having the accounts audited. It is undisputed that the 2nd defendant is obliged by statute to have the accounts audited. Similarly the duty of the plaintiffs to pay the service charges is also a statutory one. However, there is no express provision in the Enactment stating that the payment of service charges is conditional on the production of audited account. Can the court then impose such a conditional precedent? *Prima facie*, it would

A seem fair and just condition to impose such condition precedent as unit owners are fully entitled to know how the monies they had contributed had been utilised. That said I must also weigh that right to the statutory duty to pay service charges in the context of a strata scheme which I have before me.

B

[39] The payment of service charges is, I may say, the lifeline of a strata scheme in that unless the management corporation is armed with financial resources, common property of the complex will not be maintained which will inevitably lead to the C inconvenience and most importantly loss of value to the individual owners of the complex. The 2nd defendant represents all the owners of the complex and the common property of the complex is vested in them. As pointed out by learned counsel for the 2nd defendant and in my view rightly so, the statutory duty to have D accounts audited is a different type of duty to that of the duty to pay services charges. The duty to pay service charges is a substantive right under the Enactment while the duty to have the accounts audited is only procedural in nature.

E **[40]** That said and applying established principles of construing statutes; it is my view that it cannot be the intention of legislature that the right to demand payment of the service charges should be taken away when the accounts are not audited. To concede to the plaintiffs' contention would lead to an interpretation which of absurdity in that the survival of the 2nd defendant would be F compromised. The smooth running in the maintenance of a strata scheme is paramount or central to maintaining the value of the complex as a whole. Learned counsel for the 2nd defendant had also referred to the case of *Shaw v. Groom* [1970] 2 QB 504, where the Court of Appeal there had considered the issue of G whether the landlord there can demand for payment of their rent when they had failed to provide a residential tenant paying rent weekly with a rent book containing the information required by the Landlord and Tenant Act 1962 and the Rent Book (Forms of Notice) Regulations 1965. The Court of Appeal answered the H issue in the negative and in reaching its conclusion Sachs LJ had this to say at p. 523:

> Much learning has been applied to the tests by which the courts distinguish between those cases where breach by a defendant of a I statutory duty gives a plaintiff a cause of action and those where it does not. Here, by aid of citation of numerous authorities, it has been contended that the conclusive test was whether or not

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the statutory obligation under consideration was regarded as being primarily imposed for the benefit of a class or whether it was for the benefit of the public at large. In the former case it was said that the action would lie, although not in the latter. But in *Solomons v. Gertzenstein Ltd* [1954] 2 QB 243, Romer LJ, after naming a large number of those authorities, concluded, at p. 266, that in every instance it was open to the courts to consider other factors, such as whether penalties were imposed for the breach and especially "the nature of the obligation and, above all, the general purview and intendment of the Act." He went on to say that no universal rule could be formulated, and cited what Lord Simonds said in *Cutler v. Wandsworth Stadium Ltd* [1949] AC 398, 407:

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C

> The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted.
>
> D
>
> ... One must look at the relevant statute or series of statutes as a whole and then assess whether the legislature intended to preclude the plaintiff recovering in the action, even when an essential act is under consideration.

E

[41] Even applying the approach adopted by the just cited case, the duty to pay services charges in my view is a primary duty to protect a class of people which in this case is the unit owners of Wisma Pendidikan and that right cannot be taken away unless specifically provided for in the statute.

F

[42] Finally the circumstances in which the plaintiffs refused to pay is of some significance. It is undisputed that the plaintiffs refused to pay the services charges only after their plan to turn their units into a hotel was rejected by the 2nd defendant. On 2 September 2008, the 2nd defendant formally informed the plaintiffs of the rejection. From January 2009, the plaintiffs stopped payment of the services charges and then on 28 August 2009 demanded for the audit accounts to be audited.

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[43] The plaintiffs' conduct is nothing short of blackmailing the 2nd defendant which this court is not minded to condone.

[44] For reasons stated above, the answer to this issue is in the negative.

I

A **Issue 4**

Whether, In Order To Recover Service Charges, The 2nd Defendant Is Restricted Only To Registering Charges On The Properties Pursuant To s. 19(6) Of The Enactment And Proceeding Under The Land Ordinance (Sabah Cap 68)?

B

[45] It is the plaintiffs' contention that the only manner in which the 2nd defendant can recover unpaid services charges is to register charges on the plaintiffs' units. This contention is premised on s. 19(6) of the Enactment which states as follows:

C

> The management corporation may, at its absolute discretion, give to the Registrar or Collector notice in accordance with the provisions of the Land Ordinance to have the sum of contribution due under subsection (5) or any other sum due under any written law registered as a charge on the subsidiary title to the parcel
D owned by a subsidiary owner.

[46] By virtue of this provision, learned counsel for the plaintiffs submits that the 2nd defendant is prohibited from taking civil action in court to recover the service charges.

E

[47] With respect, such contention is contrary to what is intended by the Enactment. The legal status of the 2nd defendant is clearly established by s. 14(2) of the Enactment which states as follows:

F

> The management corporation, under the name appearing in the file of subsidiary register relating to the building, shall be a body corporate having perpetual succession and a common seal.

[48] What that simply means is that the 2nd defendant is a body
G corporate by itself and as such the law is such that it can by law sue and be sued in a civil court.

[49] Access to court is a basic right which can be taken away only by specific legislation and in exceptional circumstances. Learned counsel for the plaintiffs has not shown me there is such
H prohibition legislation. In fact the wordings in s. 19(6) of the Enactment points to the contrary as it uses the word 'may' which embodies the 2nd defendant a discretion.

[50] Furthermore s. 19(5) of the Enactment states:

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> A subsidiary owner on whom a contribution is levied ... and ... his successors in title **shall be jointly and severally liable** for the payment of contribution, which **shall be recoverable accordingly by the management corporation:**
>
> Provided that such contributions shall not be personal to the owner and shall not be subject to the Limitation Ordinance.

[51] This provision clearly affixes liability on the plaintiffs to pay the service charges and they are recoverable by the 2nd defendant. The provision cannot be any clearer in arming the 2nd defendant to recover unpaid service charges in court or otherwise.

[52] For reasons stated above, the answer to this issue is in the negative.

Issue 5

Whether The Plaintiffs Are Still Liable For The Sum Of RM27,335.56 Being The Plaintiffs' Alleged Contribution Towards The Canopy And Painting Expenses Totalling RM93,721.92 When The Plaintiffs Had Made A Donation For The Painting Works Up To The Sum Of Rm17,500?

[53] This is purely a factual issue as to whether the plaintiffs' contention that by virtue of their donation for painting works in the sum of RM17,500, they are not liable to contribute towards the canopy and painting expenses totalling RM93,721.92.

[54] The plaintiffs as owner of the ground, 1st, 2nd and 3rd floors have a total of 190 share units out of a total of 510 share units, or 37.25% of the total share units. This translates to the plaintiffs' contribution to the costs of the canopy and painting expenses in the sum of RM34,911.42 (RM93,721.92 x 37.2%). The sum of RM34,911.42 is in excess of some RM17,411.42 to the amount of RM17,500 donated by the plaintiffs. This mathematical calculation in my view shows the plaintiffs' contention unbelievable as rightly pointed out by learned counsel for the 2nd defendant it represents a discount to the plaintiffs for no apparent reason. In any event, the Minutes of AGM held on 18 July 2008 [pp. 4-7 exh. C] shows clearly that it was purely a donation. This is what the minutes (as translated into English) say at item 4 of the minutes:

A (1) In relation to the repainting of Wisma Pendidikan, 4 companies tendered for the job. The successful tenderer is Chip Seng Hang Marketing Sdn Bhd at the price of RM87,000.00 (30% paid).

...

B

(3) As regards the painting costs of the building, Ting Liam Siew [PW1] promised to sponsor RM17,500.00 for the enhancement of quality. The ground to 3rd floor of the building shall be green colour, whereas the 4th, 21st floor and above shall be milky white colour.

C

[55] Further the two quotations dated 8 May 2008 and 11 May 2008 by the contractor also show conclusively the following:

RM87,500.00 pay by Management Committee Wisma Pendidikan
D Kota Kinabalu RM17,500.00 pay by Mr. Ting Ling Sien @ Ting Lian Bo 500818-13-5333

[56] It is trite law that where there is inconsistency between oral evidence and documentary evidence, the latter will prevail for obvious reasons. As such there is no necessity to deal in detail
E the oral testimony of PW1 on this issue.

[57] For reasons stated above, the answer to this issue is in the affirmative.

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Conclusion

[58] In respect of the plaintiffs' claims, they are dismissed with costs on grounds set out above, save and except that the 2nd defendant is ordered to prepare the accounts of 2006 and 2007 and have the same audited within two months from today and to
G be handed over to the plaintiffs thereafter.

[59] In respect of the counterclaim, I made the following orders:

(a) Judgment of RM115,057.21 is entered against the 1st, 2nd and 3rd defendant (in the counterclaim) with interest thereon
H at the rate of 24% per annum from the date of counterclaim – 20 May 2011 till the full settlement of the same;

(b) That the 1st, 2nd and 3rd defendants (in the counterclaim) remove the 44 air-conditioner compressors from the side of
I Wisma Pendidikan at their expense within 21 days from the

date of this judgment, failing which the plaintiffs (in the counterclaim) be allowed to remove the 44 air-conditioner compressors and the costs of which shall be borne by the 1st, 2nd and 3rd defendants (in the counterclaim); and

(c) Judgment in the sum of RM15,301.33 is entered against the 1st and 2nd defendants (in counterclaim) together with interest thereon at the rate of 24% per annum from the date of counterclaim – 20 May 2011 till the full settlement of the same.

[60] As for costs for the plaintiffs' claims, I give costs to the 2nd defendant in the sum of RM40,000. As for the counterclaim, I give costs in the sum of RM8,000.